Supreme Court, U.S.
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No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

REMINGTON INVESTMENTS, INC.,
Petitioner,

v.

MOUSSA NIKBAKHT HAMEDANI,
an individual,
Respondent.

Petition for Writ of Certiorari to the Court of Appeal for the State of California, Second Appellate District, Division Two

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PETITION FOR WRIT OF CERTIORARI

DAVID J. WUKITSCH
Counsel of Record
KENNETH L. GELLHAUS
MCNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.
75 State Street, Suite 1200
Albany, NY 12207
(518) 447-3200

TEMPLETON BRIGGS
JAMES R. KNOLES
BREWER & BREWER
4533 MacArthur Boulevard
Suite 707
Newport Beach, CA 92660
(714) 424-6300

Attorneys for Petitioner Remington Investments, Inc.

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QUESTIONS PRESENTED

The FDIC took over a failed bank as receiver, and acquired its assets, including a line-of-credit note and a payment ledger related thereto. The FDIC then assigned this note and all related documents, including the payment ledger, to Petitioner.

Petitioner sued in California state court for recovery on the line-of-credit note, and set forth the amount due from the payment ledger ($104,000.00). Petitioner then filed a motion for summary judgment based on these documents, and introduced them based on the declaration of its custodian of records.

The state superior (trial) court and court of appeal held that without a foundation declaration from the custodian of records of the failed bank, the payment ledger was inadmissible. Without the ledger, no amount of damages could be proven, and the Petitioner was left with a worthless note.

The questions presented are these:

1. Is the FDIC (or its assignee) required to locate and produce a custodian of records from the failed bank in order to have the bank's records admissible in a state trial court?

2. Is it sufficient that the custodian of records of the FDIC introduce the documents, or alternatively, when the documents are assigned by the FDIC to the secondary market, is it sufficient that the custodian of records of the assignee testify that the documents are part of the packet received from the FDIC?

3. In FDIC-related cases, may states impose their own evidentiary statutes regarding custodian of records declarations, or are the states required to honor the express and implied terms of 12 U.S.C. §§ 1820, 1821, and 1823 as to the admissibility of bank documents without a declaration from a bank custodian?

4. Are the states allowed to impose contrary evidentiary requirements as to custodial declarations in FDIC-related cases than are imposed by United States district courts reviewing the same issues in similar cases?

A LIST OF PARTIES AND RULE 29.6 LIST

The parties in the state action, both at trial and on appeal, were Remington Investments, Inc., an Indiana corporation, the petitioner herein, and Moussa Nikbakht Hamedani, an individual, the respondent herein.

Remington Investments, Inc. has no parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeal of the state of California, Second Appellate District, Division Two, Case No. Civ. B 099983, is reprinted in the appendix hereto as Appendix "A". The denial of the request for review by the supreme court of the state of California is reprinted in the appendix hereto as Appendix "B". The court of appeal has issued its remittitur sending the case back to the superior (trial) court. The notice of remittitur is reprinted in the appendix hereto as Appendix "C".

JURISDICTION

The denial of the request for review by the supreme court of the state of California was filed by that court

on September 17, 1997. This petition is being filed within 90 days of that order. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1257(3).

PERTINENT STATUTORY PROVISIONS

The pertinent statutory provisions in this case are 12 U.S.C. § 1820(f), 12 U.S.C. § 1821(d)(2)(A), and 12 U.S.C. § 1823(e)(1). Copies of these specific subsections are reprinted in the appendix hereto collectively as Appendix "D".

STATEMENT OF THE CASE

A. Introduction

On or about February 19, 1991, Independence Bank ("the bank") entered into a written line-of-credit promissory note (the "Note") with one Moussa Nikbakht Hamedani ("Hamedani") whereby the bank agreed to set up a line of credit for Hamedani in an amount up to a principal sum of $106,775.00 in return for Hamedani's promise to repay all sums borrowed, plus interest thereon, by January 11, 1992. Subsequent to the execution of the Note, the bank was taken over by the FDIC as receiver. Thereafter, Remington Investments, Inc. ("Remington") purchased and was assigned the Note and all related bank documents from the FDIC, which executed an allonge on the Note evidencing said assignment. In the bank documents received from the FDIC was a payment ledger (the "Ledger") which indicated certain advances to, and payments by, Hamedani, and that there remained an unpaid balance due on the note in the amount of $104,000.00.

In the meantime, Hamedani had defaulted on the Note and has since failed and refused to pay the balance due. Hamedani has not disputed that he borrowed from the credit line, nor that some amount remained unpaid. He

has disputed the balance shown in the Ledger, not on the basis of any records he has produced, but rather that Remington could not provide a custodian of records from the bank, as required by California evidentiary statutes, to lay a foundation for the Ledger.

B. Proceedings and Disposition in the State Courts

On April 19, 1995, Remington filed suit against Hamedani in state court, for breach of the Note, specifically for the past due principal balance in the sum of $104,000.00, which amount the bank records indicated that Hamedani had withdrawn and not repaid on the line of credit, plus accrued interest, costs, and attorney fees pursuant to contract.[1] Thereafter, Remington filed a motion for summary judgment and offered as evidence the declarations of Sean Klingle, a Vice-President and custodian of records of Remington, to introduce the packet of bank documents received from the FDIC, including the Note and the Ledger of the bank showing the $104,000.00 balance due. Mr. Klingle testified that he had received all of the subject documents directly from the FDIC.

Hamedani opposed the motion for summary judgment, and disputed the obligation to repay, on several grounds. The only one addressed by the trial court, and subsequently by the court of appeal, and therefore necessary for review, is the ruling relating to Hamedani's evidentiary objections to the declarations of Sean Klingle, and relating to the requirement that a declaration of a bank officer is necessary to admit the bank documents (Pet.

[1] Remington bought an extensive portfolio from the FDIC (as did many other private investment companies across the nation), which included a number of loans made by failed California banks. Remington's California counsel filed the smaller cases in state court and the larger ones in federal court, not anticipating that the state court would apply a contrary interpretation of the controlling federal law.

App. A, pp. 2a-3a). These objections were based on the grounds that as Mr. Klingle had not worked for Independence Bank, he had no personal knowledge as to the authenticity of the bank documents transmitted to Remington from the FDIC, and that the Note and payment Ledger were not created as business records of Remington.

Specifically, Hamedani argued that the above facts meant that the business records exception to the California hearsay rule, as specifically set forth in California Evidence Code § 1271, could not be met by a Klingle declaration. A copy of this Code section is reprinted in the appendix hereto as Appendix "E". Following the hearing on the motion for summary judgment, the trial court granted the evidentiary objections of Hamedani to the Klingle declaration, and refused to admit the Ledger. Because this ruling stripped Remington of any evidence of the amount of Hamedani's indebtedness, the trial court thereupon denied Remington's motion without ruling on the other unrelated defenses raised by Hamedani.[2]

At the trial, Remington still would have to rely on Sean Klingle's testimony as to the foundation for the bank records setting forth the existence of the debt and the amount owed. Hamedani would, of course, have made the same evidentiary objections at trial against Mr. Klingle's testimony. Therefore, Remington and Hamedani stipulated that summary judgment should be entered in favor of Hamedani without the necessity of a pointless trial, so that Remington could proceed with an appeal

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[2] One of these other defenses involved a side agreement that would be precluded under the *D'Oench, Duhme* doctrine and 12 U.S.C. § 1823(e)(1), and the other involved his claim that he should not be bound to the Note since it was in English and he only read Farsi. However his declaration stated that the bank loan officer spoke Farsi, and Hamedani introduced into evidence a number of other fairly complex documents to which he was a party, which documents allegedly supported his side agreement claims. All of these were in English.

on the evidentiary matter. The trial court accommodated this approach.

In its appeal, Remington pointed out that the state law, as to the required testimony of a custodian of records of the bank that prepared those records, was preempted by specific sections of federal law. First, 12 U.S.C. § 1823(e)(1), while only referring to the exclusion of agreements that contradicted the bank's official records, clearly showed that Congress intended to give such records an extraordinary legitimacy.

Remington argued that if the FDIC was entitled to rely on the records as to the validity of the debt, then Congress must have intended that the records speak for themselves, and that Remington did not need bank custodial authentication. Remington pointed out that by the time the FDIC got around to either suing on a note acquired from the bank, or had assigned the note to a private party who then wished to sue on it, the bank custodian could have disapeared, become hostile for having lost his job, or simply not recalled the documentation. The six-year statute of limitations for FDIC claims as provided by 12 U.S.C. § 1821(d)(14)(a) shows that Congress knew that the FDIC needed an extended period of time to try to collect the bank's debts or sell them to a ready market who could collect on them. However this extended time period could also enhance the loss of availability of a bank custodian.

Remington argued that as a receiver of the bank, the FDIC in effect became the custodian of the bank's records, and therefore the testimony of a previous employee of the failed bank was not necessary. The trial court dismissed even this argument on the grounds that the FDIC was not around when the documents were prepared and even it could not make a proper California Ev.C § 1271 custodial declaration. Remington also pointed out the logical interpretation of the intent of Congress as set forth

in 12 U.S.C. § 1820(f), wherein Congress provided that copies of bank documents prepared by the FDIC "shall be deemed the original for all purposes, including introduction as evidence in all state and federal courts . . . and shall be admissible to prove any act, transaction, occurrence, or event therein recorded." (Pet. App. D, p. 16a).

Remington argued that even if Congress had not expressly made the same statement as to the originals of bank documents, by giving such admissibility to copies, it had to be assumed that Congress would certainly have intended *at least* the same admissibility for originals. Remington argued that § 1820(f), taken in conjunction with the sanctity of the bank records set forth in § 1823 (e)(1), also logically pointed to this Congressional intent. Remington also provided ample case law, both federal and Californian, to the effect that as an assignee of the FDIC, Remington was entitled to the benefit of all of the laws protecting the FDIC's ability to collect on bank assets. Although never a specific issue in the state courts herein, Remington wanted to ensure that if, under § 1820(f), the FDIC could produce copies which would have to be acceptable as admissible in state court, then Remington should have the benefit of the inference as to the originals which could logically be drawn from that statute.

The court of appeal affirmed the judgment of the trial court. The court of appeal also concerned itself solely with the admissibility of the bank Ledger setting forth the withdrawals from, and payments to, the line of credit, and the balance due as shown thereon. The court of appeal decided that although it could accept the admissibility of some of the bank documents (in this case the Note itself) without the testimony of a bank custodian of records, it would not accept the validity of the Ledger without the testimony of a bank custodian of records who could personally meet the requirements of California Ev.C § 1271. (Pet. App. A, pp. 10a-12a).

In response to Remington's arguments that if copies of bank documents prepared by the FDIC were admissible in state court for all purposes without a bank custodian, then certainly the originals should be equally admissible, the court of appeal came up with an interesting bit of reverse logic. The court of appeal took the position that § 1820(f) only superseded the best evidence rule, and did not mean that *either* copies or originals were admissible without bank custodial foundation. The court held that Remington's interpretation of § 1820(f) meant that "copies would be given a preferred status over originals", rather than accepting Remington's argument that both copies and originals were intended to be equally admissible without foundation from a bank custodian (Pet. App. A, pp. 6a-8a).

The court of appeal agreed with Hamedani that § 1823 (e)(1) only protected bank documents (regardless of form) against side agreements, and gave no special admissibility to them without bank custodial foundation. In the process, the court of appeal also rejected Remington's arguments based on the following scenario: § 1823 (e)(1) provides that no side agreements could offset the admissibility of the bank records; such side agreements could have been with a bank officer who could also be the custodian of the bank's records; and that custodian might either be hostile to the FDIC for taking over his bank, or be a friend of the debtor with his only loyalties now in that direction. Therefore that custodian might well develop a "faulty memory" and testify that the very records upon which the FDIC relied did not appear to have been prepared by the bank or in the ordinary course of the bank's business.

Surely, Remington argued, Congress did not intend that the records were sacred only as against side agreements, but also were sacred as to any attack by a bank custodian of records, which attack did not come under the term "agreements". If the records were immune to all

attack except by other official documents in the bank's records, then they should be both immune to attack by the bank custodian, and admissible without testimony from a bank custodian.

Next, the court of appeal opined that if Congress had intended originals (or copies) to be admissible without introduction by a bank custodian of records, Congress would have expressly said so (Pet. App. A, pp. 8a-9a). The court of appeal stated that if Congress had taken this approach, a rebuttable presumption of admissibility would then be created, shifting the burden of proof to the debtor that a lesser sum or no sum was owed. The court of appeal felt that this would be a serious burden on the debtor and that this approach would require an express Congressional mandate. (*Id.* at 9a).

In the process, the court of appeal did not address the fact that under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Congress already had given the FDIC a great deal of capacity to collect on bank assets, and correspondingly put a greater burden on the debtors thereof, including a 6 year statute of limitations which could start late in the running of the state statute (in California, this meant up to almost *10 years* if that state's four year statute had not run). The court of appeal also did not address the fact that § 1823(e)(1) itself, by barring all agreements with the bank not in the bank's records, took away many defenses available to debtors in non-FDIC cases, such as accord and satisfaction, and waiver (Remington cited a large body of federal case law covering all manner of such side agreements and barring every one).

The court of appeal concluded by saying that promissory notes were admissible without a bank custodian because they set forth a sum certain which was either paid (and presumably no longer in the hands of the creditor) or unpaid, but the Ledger was correctly held

inadmissible by the trial court because it contained a fluctuating amount owed. The court seemed to find fault only with the payment ledger on a line-of-credit note because of the fluctuating balance thereon due to payments and withdrawals. (Pet. App. A, pp. 10a-11a).

In the process, the court of appeal overlooked the fact that many promissory notes, although stating a sum certain, are repaid not in one lump sum, but in installments of principal and interest, and others carry installment interest-only payments. These, too, would require a ledger showing such amortization.

Regardless, the court of appeal made its decision based upon what it felt Congress did and did not intend. In the process, it rendered a valuable bank asset, relied upon by the FDIC and its assignee, into a worthless scrap of paper. The greatest travesty wrought by the interpretation of the court of appeal is to render most, if not all, of the FDIC portfolio worthless. That is exactly opposite to what Congress intended with its enactment of FIRREA.

REASONS FOR GRANTING THE WRIT

The California trial court and court of appeal have determined that California law controls the admissibility of a document reflecting an asset of a failed bank taken over by the FDIC. Congress has expressly stated that such documents are immune to collateral attack, and that copies of such documents are admissible in all state courts to prove any act, transaction, occurrence or event recorded therein. Thus the California state courts have adopted a position inapposite to clear Congressional directives relative to admissibility issues in FDIC-related cases.

Congress did not, in granting great power to the FDIC to collect on bank assets, insert express wording addressing the issue of whether a bank custodian is needed to introduce bank documents, originals or copies, in the trial

courts. Congress did provide statutory wording indicating that the FDIC became in fact the custodian of the bank records [§ 1821(d)(2)(A)]. Common sense dictates that in many FDIC-related cases, it would be well-nigh impossible to locate and obtain the testimony of a bank custodian many years later. As that custodian no longer had a duty to protect the validity of the bank's portfolio, or even his or her job with the bank, that testimony would be suspect whichever way it went (without any loyalty to an employer, such a person could very easily say whatever he or she was persuaded to say).

Remington respectfully submits that the imposition by the California courts of the testimony of a bank custodian in order to lay a foundation for the bank documents taken over by the FDIC, is so completely counter to the intent of Congress that it needs no express wording in the FDIC-related statutes to be reversed by this Court. In addition, the approach of the California courts, that they can pick which of the bank documents are acceptable without a custodial foundation, and which are not, is even more contradictory to the Congressional intent that the FDIC be entitled to rely on the official bank documents in order to ascertain and realize on the bank's assets. Either bank documents acquired by the FDIC upon taking over a failed bank and which set forth an asset and its value, are admissible in toto or they are not. Otherwise, the FDIC and its assignees would never know in advance if the asset had any value.

The opinion of the court of appeal in this case has already been certified for publication and has been published. It already has been cited in another of Remington's state court cases involving paper acquired from the FDIC, as well as a Remington case before a district court and an appeal of that decision in favor of Remington to the Ninth Circuit court of appeals. Inquiries have come to the office of Remington's attorneys from all around the country expressing concern over the effect of

this ruling of the court of appeal as possible precedent in their states.

At least two other state courts also have held that their own state law requirements of a bank custodian of records applies to the admissibility of bank documents taken over by the FDIC as the bank's receiver: *The Cadle Co. v. Phillips,* 120 N.M. 748, 906 P.2d 739 (1995); *Sholdra v. Bluebonnet Savings Bank,* 858 S.W.2d 533 (Ct.App. Tx. 1993). In the *Sholdra* case, the Texas court ruled in a manner similar to the California court of appeal herein:

> We have examined all of the cases cited by Bluebonnet and find that none is authority for Bluebonnet's expansion of the [*D'Oench Duhme*] doctrine to the effect that Texas courts must admit the official records of such institutions into evidence, although they are hearsay, without the offering party authenticating the documents as required by Tex. R. Civ. Evid. 903(6).

Sholdra, at 536.

If the courts of California and other states can now pick and choose which of the bank documents they will accept and which require the testimony of a bank custodian to be introduced into evidence, the Congressional plan for preserving the value of the bank's assets in the hands of the FDIC will become a shambles. Clearly the problem is accelerating, and a mandate from this Court is necessary to produce uniformity and consistency with the intent of Congress. The states are confusing the purposes of FIRREA and the supremacy of federal law as applied to the collection of the assets of failed banks.[3]

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[3] Remington will shortly be filing a petition with this Court for a writ of certiorari to another California court of appeal decision (*Remington v. Xep Nguyen et al.,* involving a different set of facts wherein that court of appeal ruled in a manner quite counter to the intent and purpose of § 1823(e)(1) in barring side agree-

As another basis for granting the writ, Remington obtained *two* Ninth Circuit district court decisions permitting the introduction of the bank records without a bank custodian in granting Remington summary judgment over the evidentiary objections of the debtors, one of whom cited the subject California court of appeal's decision in *Remington v. Hamedani* [*Remington Investments v. Berg Products Design, Inc.*, Case No. CV-96-6176-DT (BORx) (unpublished)]. The debtor therein has now appealed this decision to the Ninth Circuit, and is again citing the California court of appeals decision in *Remington v. Hamedani* as a basis for overturning the ruling of the district court.

The correct result also was reached in another Los Angeles district court decision in *Remington Investments v. Dale Soderlund*, Case No. SA CV 96-872 AHS (EEx) (unpublished). In that case, the debtor claimed he had made more payments on the lease than was indicated in the bank records obtained by Remington from the FDIC. At issue, as in the Hamedani case, was the admissibility of the payment ledger under a Sean Klingle declaration. The district court in the *Dale Soderlund* case required the debtor to produce cancelled checks showing such alleged additional payments. Even though the debtor claimed he could not do so because some of his records had been lost in a flood, the federal court rejected his evidentiary objection and promptly accepted the bank records without further evidentiary foundation. The district court in that case also gave Remington summary judgment on the debt.

Thus the California district court is advancing the Congressional intent behind FIRREA while the state courts herein are ignoring that intent. Surely there should not be a contradictory handling of the same issue by the state courts.

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ments, and which court used California Commercial Code § 9504 relative to disposition of collateral for a bank note, as an artificial vehicle to do so.

I. THE RELEVANT STATUTORY AND CASE LAW

A. The intent and purpose of 12 U.S.C. § 1821(d)(2)(A).

This code section states in pertinent part:

> The Corporation shall, as conservator or receiver, and by operation of law, succeed to—
>
> (i) all rights, titles, powers and privileges of the (failed bank) and of any . . . officer or director of such institution with respect to the institution and the assets of the institution; and
>
> (ii) title to the books, records and assets of any previous conservator or other legal custodian of such institution.

Clearly this code section makes the FDIC the custodian of the bank's records as if it were the bank. It (or its designated employee) stands in the shoes of the former bank officer who was the custodian. True, the FDIC cannot testify to the specific requirements of most state custodial statutes, i.e. that the records were made in the regular course of business, at or near the time of the event depicted therein, or the mode of preparation. But then neither could a later-hired bank officer who replaced a former custodian employed at the time the records were prepared. That person can only testify that the records appear consistent with the bank's general practices and procedures, and this usually is admissible.

The FDIC usually moves quickly in taking over a bank, and it usually acquires the records in their existing filing, storage, and custodial state. Certainly it can represent that the records appear genuine and consistent with the failed bank's record keeping. And of course under general assignment law, the FDIC would warrant to assignees, such as Remington, that the records are genuine bank records and validly set forth the debt depicted therein.

B. The intent and purpose of 12 U.S.C. § 1823(e)(1).

After this Court's decision in *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447 (1942), Congress addressed the concerns expressed therein in an all-inclusive statute. Rather than addressing single specific circumstances where the bank paper was not to be contradicted, Congress said it could never be contradicted unless by other documents in the bank file. The statute thereon is 12 U.S.C. § 1823(e)(1), which states;

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section . . ., either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been continuously from the time of its execution *an official record of the depository institution* (emphasis supplied).

This code section makes it clear that Congress intended that the FDIC's collection rights rise higher than the bank's, and that the FDIC would not be barred by defenses which ordinarily would have barred the bank from recovery. It should be noted that Congress referred only to "the asset" and did not define what that term comprised. Many cases decided under this code section have made it clear that it comprises, among other things, the

bank records as to the existence of an outstanding loan from the bank, and the value of that asset as reflected in the bank records as to how much was borrowed and how much was still owed.

What Congress did not expressly state was the evidentiary admissibility of the bank records, but its intent has been interpreted by federal and state courts. "*D'Oench, Duhme* [citation omitted] protects the FDIC and its assignees from unrecorded side agreements not reflected in the bank's records. . . . *It allows the FDIC to rely on the official bank records to the exclusion of any extraneous matters* [emphasis supplied], to set forth the rights and obligations of the bank and those to whom it lends money," *Federal Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691, 697 (5th Cir. 1991). It would certainly appear that the phrase "rely on" would have to mean the ability to do so even though the FDIC did not have, and might not be able to procure, a declaration from the bank's custodian of records. And it would seem that such reliance should not be undercut by a state court later requiring such a custodian.

In *Langley v. FDIC*, 484 U.S. 86 (1987), this Court explained that "one purpose of § 1823(e) is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets" and "[n]either . . . would be able to make reliable evaluations if bank records contained semingly unqualified notes that are in fact subject to undisclosed conditions." *Id.* at 91-92.

A key element in the controlling federal law is the right to rely on the bank's written records as to the validity of a debt. There is no requirement that the FDIC, an assignee from the FDIC, *or a court of law* must have a declaration by the bank's custodian of records as to the validity of those records in order to be able to rely on those records. Clearly this Court was stating in *Langley* that the records speak for themselves as to the value and

enforceability of the debt. There was no requirement of reliance only if a bank officer could be produced to verify the records *and no federal decision has stated otherwise.*

The courts have consistently held that the statute unquestionably permits the FDIC to introduce the records as if they were its own. As even California courts have uniformly held, the FDIC's assignees are entitled to the same rights.

C. The logical interpretation of 12 U.S.C. § 1820(f).

12 U.S.C. § 1820(f) states in pertinent part:

> Such . . . copies [of bank records] shall be deemed the original for all purposes, including introduction as evidence in all state and federal courts or administrative agencies and shall be admissible to prove any act, transaction, occurrence, or event therein recorded.

The California court of appeal, having decided in the case at bar that the originals cannot be introduced without a bank custodian of records, decided that the wording of § 1820(f) should be interpreted only as a contradiction of the best evidence rule.

But that is not what the statute says. If Congress had intended only that, it would have simply ended with the statement that the copies are as good as originals for *introduction* as evidence. Section 1820(f) adds a second, separate mandate which is far more than a mere redundancy of the first mandate. After the "and", the statute mandates *admissibility* with no mention whatsoever of the need for a custodian of records. This statute clearly overrides such state evidentiary statutes as California's Ev.C § 1271 which requires a custodian of records from the institution that prepared them, in this case the failed bank. Any other interpretation makes a mockery of the intent of Congress in passing FIRREA, which was to make it as easy as possible for the FDIC to collect on the bank's assets. In particular it makes a mockery of § 1821(d)(2)

(A) which specifically makes the FDIC the custodian of the bank's records, whether such records are originals or copies.

As the assignee of the FDIC, Remington succeeded to the protection of federal law designed to enhance the FDIC's ability to collect on the notes received from failed banks. *Newton v. Uniwest Financial Corp.*, 967 F.2d 340, 347 (9th Cir. 1992) (explaining that the FDIC would have difficulty selling off loans if the protection of *D'Oench, Duhme* did not apply to the FDIC's successors in interest). The California court in *Weber v. New West Sav. & Loan Assn.*, 10 Cal.App.4th 97, 12 Cal.Rptr.2d 468 (1992), also agreed that "assignees of the FDIC and the FSLIC enjoy the protection of the [*D'Oench, Duhme*] doctrine." *Weber*, at 10 Cal.App.4th 105. Prior to the case at bar, California courts have complied with federal supremacy. In *White v. Moriarty*, 15 Cal. App.4th 1290, 19 Cal.Rptr.2d 200 (1993), the court held that the federal six year statute of limitations for FDIC lawsuits in 12 U.S.C. § 1821(d)(14)(A) controlled over the California four year statute. That court also agreed that the FDIC's assignee is entitled to the benefit of the federal statute.

D. Other relevant federal law.

Even in non-FDIC cases, federal evidentiary law gives wider latitude than California Ev.C § 1271 as to introduction of records prepared by another. In *Miss. River Grain Elevator, Inc. v. Bartlett & Co. Grain*, 659 F.2d 1314 (1981 CA 5 La), the court stated at page 1319 the following principle, which also has been set forth in almost every other federal district:

> [federal Evidence] Rule 803(6) does *not* (sic) require that the records be prepared by the business that has custody of them. Where circumstances indicate that the records are trustworthy, the party seeking to introduce them does not have to present the testimony of the party who kept the record or

> supervised its preparation. The issue of admissibility under Rule 803(6) is chiefly a matter of trustworthiness. In this inquiry the trial court is given great latitude.

See also United States v. Veytia-Bravo, 603 F.2d 1187 (5th Cir. 1979), *cert. denied,* 444 U.S. 1024, (1980); *United States v. Hathaway,* 798 F.2d 902 (6th Cir. 1986).

Sean Klingle testified that the documents which were assigned to Remington were received from the FDIC. The FDIC puts its allonge on the Note. (Pet. App. A, p. 2a). The Ledger was part of the packet with the Note. Sean Klingle's declaration meets the requirements of Rule 803(6) and the interpretation thereof.

The Ninth Circuit, in *United States v. Childs* 5 F.3d 1328 (9th Cir. 1993) (a non-FDIC related case) discussed a number of situations where a party who was the present custodian, but who was not present when the documents were initially prepared or part of the organization that prepared them, could still offer admissible exhibit. The *Childs* court set forth the rule that "[u]nder federal Rules of Evidence, documents may provide their own authentication or the necessary foundation may be established by extrinsic evidence." *Id.* at 1336.

When the above principles are applied to an FDIC-related case, they only reinforce the conclusion of Congressional intent that the bank documents taken over by the FDIC speak for themselves as to authenticity and admissibility (certainly Congress intended the presumption that the FDIC would not tamper with them). Therefore it seems clear that no further foundation is necessary other than a declaration from the custodian of records of either the FDIC, or of the assignee of the FDIC that the records were received in the packet from the FDIC. As indicated above, Remington's entire experience as to the resolution of the matter of admissibility of bank records in federal court in the Ninth Circuit, has been the granting of admissibility without a bank custodial declaration.

II. THE COMMON SENSE BEHIND THE CLEAR INTENT OF FDIC-RELATED LAW THAT NO BANK CUSTODIAN OF RECORDS DELARATION SHOULD BE REQUIRED

There is both a common sense and a sound public policy basis for holding that the testimony of the bank custodian of records is not required to lay a foundation for the records setting forth a bank asset taken over by the FDIC. Once a bank has failed, its custodian of records, as well as any officers who may have dealt with its customers, scatter and may even have left the jurisdiction. Often their identity cannot be ascertained from what is left of the bank's records. The FDIC takes over, and acquires the bank's records (many of which are on microfiche since the originals were already destroyed). The FDIC custodian of records would be in no position to make the usual state law declaration (i.e., California Evidence Code § 1271) as to the preparation and maintenance of the bank's loan documents.

Even if a bank custodian were located, after such a potential passage of time he or she might not be in a position to testify positively as to what was in the bank records. The custodian might be hostile to the interests of the FDIC, having lost his or her job at best and, if an owner, his or her bank at worst. And that person could well testify that the records do not appear to be correct. Or he or she might regrettably be "persuaded" to authenticate records as to which that person really had no basis for so doing.

The federal courts have addressed this situation by allowing the bank records to speak for themselves as long as they are not contradicted by other records *prepared by or agreed to in writing by the bank,* and allows the FDIC custodian (or its assignee custodian) to simply declare that he is in possession of the bank records or true copies thereof. If these rules were not enforced, any debtor could simply testify that he or she had other agreements

with the bank cancelling a debt, or that the bank note had been wholly or partially repaid, all without introducing evidence of same.

Regardless, under the interpretation of the California courts in the case at bar, the debtor is even better off if the bank custodian cannot be located. In such a case the truthfulness of the custodian would not be at issue. The California courts would simply allow the debtor to make an evidentiary objection because the custodian of the FDIC or its assignee could not speak as custodian of the bank, thereby making the bank's debt records inadmissible no matter how valid they might be.

SUMMARY

FIRREA is designed to give the FDIC the maximum ability to collect on the assets of failed banks in order to save taxpayers' money. This ability is enhanced by having a ready secondary market to whom the FDIC can sell the bank paper. Both federal and California courts have then applied the federal rights and safeguards to the assignees . . . until this case. California has recognized federal supremacy in this area . . . until this case.

Remington respectfully submits that the published opinion of the California court of appeal herein is not only contradictory to the intent and purpose of Congress as set forth expressly and impliedly in the statutes, it also sets a dangerous precedent not only in California, but in any other state that has not addressed the issue or already set precedent consistent with the federal courts' approach. As set forth above, at least two other states have already taken the wrong path.

CONCLUSION

For all the foregoing reasons, Remington's petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID J. WUKITSCH
Counsel of Record
KENNETH L. GELLHAUS
MCNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.
75 State Street, Suite 1200
Albany, NY 12207
(518) 447-3200

TEMPLETON BRIGGS
JAMES R. KNOLES
BREWER & BREWER
4533 MacArthur Boulevard
Suite 707
Newport Beach, CA 92660
(714) 424-6300

Attorneys for Petitioner Remington Investments, Inc.

DATED: December 12, 1997

APPENDICES

APPENDICES

APPENDIX A

[Filed Jun. 12, 1997]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

B099983

(Super. Ct. No. BC126128)

REMINGTON INVESTMENTS, INC.,
Plaintiff and Appellant,

v.

MOUSSA NIKBAKHT HAMEDANI,
Defendant and Respondent.

Appeal from a judgment of the
Superior Court of Los Angeles County

This case concerns the requirements for proving a debt owing to a bank taken over by the FDIC. After the FDIC took over the bank in this case, the FDIC assigned the bank's assets to the plaintiff. One such asset was the lender's position in a "revolving line of credit." The line of credit was evidenced by a document somewhat inaccurately entitled "Promissory Note." The Promissory Note document was not a promissory note for a specific sum, but rather provided that defendant was liable for all sums which might either be "advanced" to defendant or "credited to any of [defendant's] accounts with [the

bank]." In the Promissory Note document, defendant promised to repay either $106,775 "or so much as may be outstanding, together with interest on each of the unpaid outstanding principal balances from the date of the advance until repayment of the advance or maturity, whichever occurs first." The Promissory Note document itself does not reveal exactly how much was advanced or how much was repaid.

The plaintiff as assignee of the FDIC sued defendant for the amount plaintiff claimed was owing on the line of credit. Plaintiff moved for summary judgment and offered in support of its motion a copy of a document entitled "Note Ledger." The Note Ledger was a form filled in by hand which purported to cover approximately twelve months. It allegedly showed that defendant had made twelve draws in varying amounts on the line of credit over a period of approximately six months, totaling $104,000. The Note Ledger also allegedly recorded eleven interest payments in varying amounts, but no principal payments. One interest payment was shown reversed as "nsf," but there was no subsequent adjustment either to the loan balance or to the one subsequent interest payment recorded. Although the recorded advances total only $102,000, the Note Ledger shows the final loan balance as $104,000. The $2,000 discrepancy appears to be an arithmetic error rather than an interest adjustment.

To lay a foundation for admission of the Note Ledger in evidence, plaintiff presented the declarations of plaintiff's own vice president. He declared that he is familiar with the records of commercial paper owned by plaintiff, including the Promissory Note document and Note Ledger in issue here. He stated that he is a custodian of plaintiff's records, that plaintiff's records are made in the ordinary course of business at or near the time of the event they record, and that they are made by persons who have a business duty to record such information. He declared that he found the Note Ledger in the records plaintiff received from the FDIC. Plaintiff presented no evidence

of the record-keeping practices of the bank during the period allegedly recorded on the Note Ledger, and hence presented no evidence of the manner in which the Note Ledger was prepared, the origin of the information it contained, etc. Plaintiff similarly did not attempt to lay any other foundation for admission of the Note Ledger by way of admission, estoppel, etc.

Defendant objected to admission of the Note Ledger on grounds of hearsay and lack of foundation for any exception to the hearsay rule.[1] The trial court sustained the objection, and denied plaintiff's motion, ruling: "There is a triable issue as to what the defendant owes. The objections to [the vice president's] declaration and the note ledger from [the bank] are sustained." The order denying summary judgment stated that a triable issue of material fact existed as to the amount defendant owed on the note.

Plaintiff and defendant then stipulated that judgment could be entered against plaintiff, and it was. Plaintiff now appeals.

DISCUSSION

1. *The D'Oench Duhme* doctrine.

Plaintiff primarily argues that the Promissory Note document and Note Ledger both must be admitted in evidence simply because they are documents found in bank

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[1] The most likely applicable exception would be the business records exception set forth in Evidence Code section 1271. Section 1271 provides: "[e]vidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

"(a) The writing was made in the regular course of a business;

"(b) The writing was made at or near the time of the act, condition, or event;

"(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

"(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

records which were received by plaintiff from the FDIC, and which the FDIC obtained when it took over the bank. Plaintiff claims that admissibility is required by the *D'Oench Duhme* doctrine (*D'Oench Duhme & Co.* v. *F.D.I.C.* (1942) 315 U.S. 447) and corresponding federal statutes. (12 U.S.C. § 1823, subd. (c)(1) and 12 U.S.C. § 1820, subd. (f).) The *D'Oench Duhme* doctrine and its codification and arguable expansion in 12 U.S.C. § 1823, subdivision (e) (see *Federal Sav. & Loan Ins. Corp.* v. *Griffin* (5th Cir. 1991) 935 F.2d 691, 698; *Sunburst Bank* v. *Executive Life Ins. Co.* (1995) 24 Cal.App.4th 1156, 1165) preclude the use of "side agreements" to diminish the rights of the FDIC in assets acquired from failed financial institutions.[2] The purpose is to preclude the use of secret, extraneous agreements to

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[2] 12 U.S.C. § 1823, subdivision (e) provides: "No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository, shall be valid against the Corporation unless such agreement—

"(1) is in writing,

"(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

"(3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

"(4) has been, continuously, from the time of its execution, an official record of the depository institution."

The application of the common law *D'Oench, Duhme* doctrine has been narrowed by the United States Supreme Court in *O'Melveny & Myers* v. *F.D.I.C.* (1994) 512 U.S. 79. (See *DiVall Insured Income Fund* v. *Boatmens' First Nat. Bank* (8th Cir. 1995) 69 F.3d 1398, 1402; *F.D.I.C.* v. *O'Melveny & Myers* (9th Cir. 1995) 61 F.3d 17, 18-19 ["Since the FDIC is a federal instrumentality, long-standing case law then stood for the proposition that the application of defenses against the FDIC were governed by federal law. See [citations, including *D'Oench, Duhme*] These cases have now been overruled by the Supreme Court . . ."].]

avoid obligations to banks taken over by the FDIC. (See *Langley* v. *FDIC* (1987) 484 U.S. 86, and *Federal Sav. & Loan Ins. Corp.* v. *Griffin, supra*, 935 F.2d 691, 697 ["*D'Oench, Duhme* . . . allows the FDIC to rely on the official bank records, to the exclusion of any extraneous matters"].)

Langley, supra, involved a promissory note for a sum certain. The borrower opposed the FDIC's attempt to collect on the note by alleging that the bank had procured the note by making oral misrepresentations. The United States Supreme Court in *Langley* found that the *D'Oench Duhme* doctrine was intended to accomplish two purposes: First, it was intended to allow bank examiners to rely on a bank's official records without regard to undisclosed conditions or agreements. Second, it was intended to ensure that senior bank officials consider and approve any enforceable agreement entered into with a borrower. *Langley* construed a claim of misrepresentation as tantamount to a claim of side agreement, and ruled that the *D'Oench Duhme* doctrine extended to preclude claims of misrepresentation, as well as claims of side agreement, as a basis to avoid obligations to banks taken over by the FDIC.

Langley established that the *D'Oench Duhme* doctrine has an expansive reach. It is generally cited for that proposition. However, there are several important distinctions between the present case and *Langley*. First, neither *Langley* nor its progeny concerned a "revolving line of credit," as opposed to a loan for a sum certain.[3] Second, neither *Langley* nor its progeny concerned the question of admissibility of documents to prove the content of bank records. Instead, these cases concerned either the subject of "side agreements" raised as a defense, or the issue of

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[3] The significance of this point is further developed in section 4 below dealing with the presumption regarding fixed sum promissory notes contained in Evidence Code section 635.

whether claims of fraudulent misrepresentation or omission were precluded just as claims of side agreements are precluded. (See, e.g., *Resolution Trust Corporation* v. *Ehrenhaus* (7th Cir. 1994) 34 F.3d 441 [*D'Oench Duhme* prevents guarantor from relying on fraud defense]; *FDIC* v. *Bell* (10th Cir. 1989) 892 F.2d 64 [same]; *McCullough* v. *FDIC* (1st Cir. 1993) 987 F.2d 870 [*D'Oench Duhme* prevents borrower from relying on fraud defense]; *FDIC* v. *State Bank of Virden* (7th Cir. 1990) 893 F.2d 139 [co-participating bank cannot rely on set-off].)

There is no defense of side agreement, misrepresentation or omission involved here. The question for the trial court simply was what amount defendant owed. Plaintiff bore the burden of proof on that issue. Plaintiff attempted to meet that burden by attempting to prove the content of the bank's records through an offer of the Note Ledger. The Note Ledger was hearsay, and its offer into evidence raised the question of its admissibility to prove the truth of its contents. Nothing in the authorities cited above suggests that any document found in a bank's records is admissible to impose liability on a defendant even if the document fails to meet normal standards of reliability. The *D'Oench Duhme* cases and statutes do not provide, as plaintiff urges, that the "records speak for themselves as to enforceability of the debt." A rule allowing or requiring admissibility of any document found in a bank's records without evidence of reliability would be a sharp break with past practice, could raise grave implications for the continued maintenance of reliable bank records over the long term, and is far beyond the scope of the *D'Oench, Duhme* doctrine.

2. The FDIC document reproduction and retention statute.

Plaintiff also contends that 12 U.S.C. section 1820, subdivision (f), requires automatic admissibility of any document found by the FDIC in the files of a failed bank.

The contention has some superficial semantic appeal in light of the wording of the statute, but ultimately cannot be correct. The code section provides: "The Corporation [the FDIC] may cause any and all records, papers, or documents kept by it or in its possession or custody to be photographed or microphotographed or otherwise reproduced upon film, which photographic film shall comply with the minimum standards of quality approved for permanent photographic records by the National Institute of Standards and Technology. Such photographs, microphotographs, photographic film or copies thereof *shall be deemed to be an original record for all purposes, including introduction in evidence in all State and Federal courts or administrative agencies and shall be admissible to prove any act, transaction, occurrence, or event therein recorded.* Such photographs, microphotographs, or reproduction shall be preserved in such manner as the Board of Directors of the Corporation shall prescribe and the original records, papers, or documents may be destroyed or otherwise disposed of as the Board shall direct." (Italics added.)

It should initially be noted that this section is found not in an area of the code governing trial or court procedures, but rather in a series of sections governing the administration of the FDIC. Nevertheless, in view of the language italicized above, plaintiff urges that this section was intended to mandate that a copy of any document found in a failed bank's records is automatically admissible without foundation.

This section does provide that copies shall be deemed the same as originals. The section therefore avoids best evidence objections to copies held by the FDIC. However, if this section were interpreted to provide that copies were admissible without a foundation, a quite incongruous situation would be created: copies would be given a preferred evidentiary status over originals. There is nothing in the section to suggest a Congressional intent to change

the rules for admissibility of originals. If the section were interpreted as plaintiff urges, copies would be admissible without foundation, even though originals would not be admissible unless a foundation were first laid. The best evidence rule would then be inverted, with copies admissible and their originals inadmissible, even though photocopying a document does not make it more reliable. If this were the intent and proper construction of section 1820, originals (even when available) would rarely be offered in evidence, because a foundation would then be required. Instead the FDIC or its assignee, even if it had originals, would simply photocopy the originals to dispense with the otherwise-applicable requirement of a foundation. It would be an absurd construction of the statute to conclude that the statute was intended to provide that the burden of laying a foundation can be avoided by a trip to the photocopying machine. Whenever one of two or more possible constructions of a statute leads to an absurdity, the appearance of the absurdity is an indication that the proposed construction is incorrect. No such absurdity arises if section 1820 is confined to its apparent purpose: allowing the use of copies the same as if they were originals, thus eliminating the necessity of storing and safeguarding originals. This construction, however, which we place on the statute, retains the foundational requirements that normally apply to originals.

3. Congress could presumably change the law, but has not.

We have therefore been cited first to a doctrine which precludes reliance on side agreements or claims of misrepresentation, and second to a Federal statute which allows copies to be used the same as originals. Since no side agreement or misrepresentation is involved here, the doctrine is not implicated. Copies could likely be used the same as originals under California evidence law in any event. (Evid. Code § 1511 [admissibility of duplicates].)

We have not been cited to any Federal statute requiring the admission of documents offered as business records without proof that the documents in fact qualify as business records (i.e., the foundational elements required by Evid. Code § 1271).

Congress presumably could enact a statute providing that any document found in the records of a failed bank is presumed accurate and is therefore admissible to impose liability on a bank customer. A rebuttable presumption would then be created, shifting to the bank customer the burden of proving that the customer *does not* owe whatever amount is stated on the bank document. The burden of mistakes or inaccuracies in bank records would then be shifted from the FDIC and its assignees to the customer. There are arguable reasons in favor of such a rule. However, there are also strong reasons against such a rule. A bank customer normally does not see bank records and has no control and little influence over their creation. Bank customers are often individuals who can ill afford the burden of mistaken imposition of a sizeable liability. If a proposal were expressly made in Congress to create a rule of law making a bank customer presumptively liable for whatever amount the bank's documents might reflect—even if there were no evidence of how the documents were prepared, where the information came from, etc., and hence no foundation for the trustworthiness of such documents—that proposal would likely be the subject of considerable debate as Congress considered the pros and cons of such a rule, whether it should be qualified, how, etc. The context in which the documents were prepared—by a bank in the process of failing—would also likely be a subject for legislative discussions. There is no indication that such legislative discussions ever took place, and Congress has never enacted a statute expressly stating such a rule.

4. Evidence Code section 635 does not supply a presumption applicable to a line of credit agreement.

Evidence Code 635 provides that "[a]n obligation possessed by the creditor is presumed not to have been paid." This presumption, as are all evidentiary presumptions, is based upon the probabilities of a given situation. Normally, a promissory note is given to a lender contemporaneously with the borrower's receipt of the face amount of the note. When a promissory note is paid, the note is normally cancelled. Thus when the lender holds an uncancelled promissory note, truth favors the conclusion that the borrower received the money and did not repay the note. The law thus creates a presumption in favor of this conclusion. The burden then shifts to the borrower to rebut the presumption either by proving payment, or by proving that the face amount of the note was never advanced. (Cf. *Light* v. *Stevens* (1911) 159 Cal.288; *Van Fleet-Durkee* v. *Oyster* (1952) 112 Cal.App.2d 739 [both cases common-law precursors of Evidence Code section 635].)

The presumption of nonpayment appears based to some extent on the negotiability of an unconditional promissory note, and to some extent on the simple inadvisability of repaying a note without receiving cancellation of the note. If a note is unconditional and therefore negotiable, the uncancelled note could be sold to a holder in due course, who could then enforce it against the maker of the note. Even if the note is not sold to a holder in due course, the borrower may be faced with the appearance of an outstanding debt in the hands of the lender or its successors if a promissory note is not cancelled after payment. Thus the California Supreme Court stated in *Light:* "It is the ordinary course of business on the part of reasonably careful persons to require the delivery of their written obligations upon discharge thereof, or if this cannot be obtained, to require some written evidence of the dis-

charge, and it would be quite a departure from 'the ordinary course of business,' which is presumed to have been followed [citation], to pay the full amount due on a note without receiving the note from the payee or, if it cannot be delivered, some other evidence of payment." (159 Cal. 288, 292-293).

In many circumstances, this evidentiary rule would operate to the benefit of an assignee of the FDIC. The linchpin of the presumption, however, is the near-certainty that the face amount of a promissory note was advanced when the note was made. The notes involved in both *Light* and *Van Fleet-Durkee* were unconditional, fixed-sum, promissory notes. Here plaintiff does not hold an uncancelled promissory note for any sum certain. The agreement to repay reflected on the document headed "Promisssory Note" is not an unconditional agreement to repay a sum certain. Instead, it is only a conditional agreement to repay whatever sums might periodically be advanced. The mere existence of this line of credit agreement does not support a presumption that the full amount of the line was ever advanced. For the same reason, the "Promissory Note" document would not, for example, be negotiable.

If plaintiff did hold an uncancelled promissory note for a sum certain, the presumption created by Evidence Code section 635 would then apply to shift the burden to defendant to prove that the debt had been paid, in whole or in part. This presumption can likely be utilized by FDIC assignees in many cases. In this case, however, since plaintiff is only the assignee of the creditor's position in a "revolving line of credit," no presumption applies. Instead, plaintiff bore the typical burden of proving its case by admissible evidence.

5. Authentication versus hearsay.

The Promissory Note document itself is not a business record as that term is used in the law of hearsay, but

rather is an operative contractual document admissible merely upon adequate evidence of authenticity. Sufficient evidence of authenticity to support admission of the Promissory Note document could be supplied by numerous means, at least some of which would likely be available even to the FDIC or its assignees. (See Evidence Code sections 1400 et seq.). The trial judge's minute order denying summary judgment astutely sustained defendant's hearsay objection only to the Note Ledger. The minute order makes no ruling excluding the Promissory Note document. The Note Ledger was claimed to record advances, payments, etc. It was submitted to prove the factual accuracy of the periodic events it allegedly recorded. It was therefore not admissible over a hearsay objection unless supported by the foundation specified in Evidence Code section 1271, consisting of elements designed to ensure its trustworthiness, or by some other foundation (i.e., admission, estoppel, etc.).

6. Conclusion.

The trial court was correct in sustaining the hearsay objection to the Note Ledger. Only the Promissory Note at most was admissible. The Promissory Note in isolation did not show what amounts were advanced pursuant to the line of credit, what amounts were repaid, when, what interest had accrued, etc. The trial court was therefore correct in finding a triable issue as to amount owing and in denying summary judgment. After the summary judgment motion was properly denied, the parties stipulated that judgment be entered against plaintiff. Perhaps there were business reasons for this stipulation. Whatever the reasons may have been, it was certainly proper for the trial court to enter judgment as the parties wished. We can find no error in any of the trial court's rulings.

This is not a completely pleasing result in light of the strong indications in the record that defendant does owe some amount. In most instances, however, such a result

will not be foreordained. This is a preponderance-of-the-evidence system. The evidence need not be precise or overwhelming to support a judgment. However, *some* admissible evidence is necessary to support a judgment, whether direct or circumstantial, admitted into evidence by way of one foundation or another. Here no admissible evidence was offered, and summary judgment was therefore properly denied.

DISPOSITION

The judgment is affirmed. Each side to bear their own costs on appeal.

CERTIFIED FOR PUBLICATION.

/s/ Zebrowski, J.
ZEBROWSKI, J.

We concur:

/s/ Boren, P.J.
BOREN, P.J.

/s/ Nott, J.
NOTT, J.

APPENDIX B

[Filed Sep. 17, 1997]

Second Appellate District, Division Two, No. B099983
S063007

IN THE SUPREME COURT OF CALIFORNIA

REMINGTON INVESTMENTS INCORPORATED,
Appellant

v.

MOUSSA NIKBAKHT HAMEDANI,
Respondent

Appellant's petition for review DENIED.

/s/ Mosk
Acting Chief Justice

APPENDIX C

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 2

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2 Civil B099983
Los Angeles No. BC126128
Judge: BOBB, A.

REMINGTON INVESTMENTS, INC.

vs.

HAMEDANI, MOUSSA N.

—REMITTITUR NOTICE—

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 06/12/97 is now final.

—Affirmed In Full.—

[Oct. 9, 1997]

JOSEPH A. LANE
Clerk

By:
Deputy Clerk

APPENDIX D

TITLE 12. BANKS AND BANKING
CHAPTER 16. FEDERAL DEPOSIT INSURANCE CORPORATION

12 USCS § 1820 (1997)

§ 1820. Administration of Corporation

* * * *

(f) Preservation of records by photography; admissibility as evidence. The Corporation may cause any and all records, papers, or documents kept by it or in its possession or custody to be photographed or microphotographed or otherwise reproduced upon film, which photographic film shall comply with the minimum standards of quality approved for permanent photographic records by the National Bureau of Standards. Such photographs, microphotographs, or photographic film or copies thereof shall be deemed to be an original record for all purposes, including introduction in evidence in all State and Federal courts or administrative agencies and shall be admissible to prove any act, transaction, occurrence, or event therein recorded. Such photographs, microphotographs, or reproduction shall be preserved in such manner as the Board of Directors of the Corporation shall prescribe and the original records, papers, or documents may be destroyed or otherwise disposed of as the Board shall direct.

* * * *

12 USCS § 1821 (1997)

§ 1821. Insurance Funds

* * * *

(2) General powers.

(A) Successor to institution. The Corporation shall, as conservator or receiver, and by operation of law, suceed to—

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

* * * *

12 USCS § 1823 (1997)

§ 1823. Corporation Monies

* * * *

(e) Agreements against interests of Corporation.

(1) In general. No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 11 [*12 USCS § 1821*], either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—

(A) is in writing,

(B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,

(C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

(D) has been, continuously, from the time of its execution, an official record of the depository institution.

* * * *

APPENDIX E

§ 1271. Admissible writings

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made in the regular course of a business;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness. (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967.)

Supreme Court, U.S.
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No. 97-984

In The

Supreme Court of the United States

October Term, 1997

REMINGTON INVESTMENTS, INC.,

Petitioner,

vs.

MOUSSA NIKBAKHT HAMEDANI, an individual,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal for the State of California, Second Appellate District, Division Two

RESPONDENT'S BRIEF IN OPPOSITION

JUDITH B. GITTERMAN
Counsel of Record
JENKENS & GILCHRIST
SOLISH, ARBITER & GEHRING
Attorneys for Respondent
12100 Wilshire Boulevard
15th Floor
Los Angeles, California 90025
(310) 820-8800

144508

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

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QUESTIONS PRESENTED

1. Whether the California court of appeal, under an abuse of discretion standard, properly upheld the trial court's ruling that a declarant with no knowledge of the record-keeping practices of a bank was not qualified to testify as to whether the bank's records were business records.

2. Whether the California court of appeal properly ruled that the trial court did not abuse its discretion when it ruled that a note ledger (the "Note Ledger") which was untrustworthy on its face, introduced by a declarant with no knowledge of how it was prepared, was inadmissible to prove a borrower's indebtedness on a line of credit.

3. Whether the California court of appeal, under an abuse of discretion standard, correctly ruled that the trial court had properly denied summary judgment to a moving party plaintiff unable to produce admissible evidence in support of its causes of action.

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STATEMENT OF THE CASE

The petition contains several glaring misstatements. Most notably, both in its Questions Presented section and in its Statement of the Case, petitioner erroneously claims that the decision in the trial court and court of appeal turned solely on whether or not Remington could produce a custodian of records from Independence Bank, the failed bank.

Petitioner has misstated the record in asserting that the court of appeal and trial court held that a custodian of records from Independence Bank was required in order for the Note Ledger to be received in evidence. In fact, the court of appeal held:

> Plaintiff presented no evidence of the record-keeping practices of the bank during the period allegedly recorded on the Note Ledger, and hence presented no evidence of the manner in which the Note Ledger was prepared, the origin of the information it contained, etc. Plaintiff similarly did not attempt to lay any other foundation for admission of the Note Ledger by way of admission, estoppel, etc.

(App. 2a-3a).[1]

The court of appeal went on to explain why the Note Ledger was therefore inadmissible hearsay:

> The Note Ledger was claimed to record advances, payments, interest accruals, etc. It was submitted to prove the factual accuracy of the periodic events it

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1. References to the Petitioner's Appendix are marked as: ("App.__"). References to the Petition are marked as: ("Pet.__"). References to the Clerk's Transcript, the Record on Appeal, are marked as: ("CT __").

> allegedly recorded. It was therefore not admissible over a hearsay objection unless supported by the foundation specified in Evidence Code section 1271, consisting of elements designed to ensure its trustworthiness, or by some other foundation (i.e., admission, estoppel, etc.).

(App. 12a).

As the court of appeal recognized, Remington failed to introduce **any** admissible evidence whatsoever, "whether direct or circumstantial, admitted into evidence by way of one foundation or another." (App. 13a).

Petitioner inaccurately maintains that Hamedani disputed the balance shown on the Note Ledger solely on the ground that Remington could not provide a custodian of records from the bank to lay a foundation. (Pet. 2-3). To the contrary, Hamedani raised many defenses in the trial court, including the evidentiary objections to Sean Klingle's declarations and the Note Ledger. (CT 73). Nor, as petitioner mistakenly asserts, were Hamedani's evidentiary objections to the Declarations of Sean Klingle and the Note Ledger based on the fact that "Mr. Klingle had not worked for Independence Bank." (CT 146, 165-169). As Hamedani argued, and as the trial court and court of appeal have agreed, proper foundation was not laid for admission of the Note Ledger. Such foundation could have come from the testimony of an Independence Bank custodian of records or other employee familiar with the bank's record-keeping practices, or from someone else with personal knowledge as to the record-keeping practices of the bank.

Additionally, the petition omits several important facts regarding the untrustworthiness of the Note Ledger which were noted by the court of appeal. As the court of appeal observed,

the ledger was a document filled out by hand that purported to cover twelve months. (App. 2a). There were several columns of the ledger that were left totally blank. As to those columns of the ledger which were filled out, the numerical entries all lined up neatly, and appeared to be one person's handwriting. (CT 135). This leads to the inescapable conclusion that the ledger was a summary document prepared after the fact, rather than a record filled out periodically at the time of each transaction.

The ledger was missing essential data in several columns: there were no entries in the columns labeled: "requested by", "written/oral", "auth. by" and "principal payment." (CT 135). It appeared, both from the presence of these column headings and from the language of the promissory note, that the bank's regular course of doing business was to require a bank employee to state who was requesting an advance on the line of credit, whether the request was written or oral, and who had authorized the advance. (CT 6, 135). As the appellate court noted, there was a notation that one interest payment was reversed as "nsf" but there was no subsequent adjustment either to the loan balance or the one subsequent interest payment recorded on the ledger. (App. 2a; CT 135). There was also a mathematical error: the recorded advances total only $102,000, while the Note Ledger shows a final loan balance of $104,000. (App. 2a; CT 135).

Contrary to petitioner's assertion, the court of appeal did not state that courts can pick and choose which bank documents are admissible. The court of appeal did make a distinction between the "Promissory Note" and the Note Ledger, but not, as petitioner claims, based on the former's being admissible without a custodian of records declaration and the latter being admissible only with such a declaration. (Pet. 6). Rather, the distinction was between requirements for authentication (pursuant to California Evidence Code § 1400 *et seq.*) and for

admission of a business record over a hearsay objection. The court of appeal observed that the Promissory Note was submitted as an operative contractual document and was not offered to prove the amount owed, whereas the Note Ledger was being offered to prove "the factual accuracy of the periodic events it allegedly recorded." (App. 12a).

REASONS FOR DENYING THE WRIT

I.

THERE IS NO COMPELLING REASON FOR SUPREME COURT REVIEW.

This petition fails to meet the criteria for United States Supreme Court review as set forth in Rule 10 of the Supreme Court Rules. The California Supreme Court denied petitioner Remington's petition for review and the court of appeal's ruling did not conflict with any other California appellate court ruling.

Although Remington seeks to create a conflict of authority, it fails to cite any published decisions in either state or federal court that are contrary to the opinion in this case. Remington also ignores the fact that the court of appeal decision comports with prevailing authority in California, as well other jurisdictions.[2] In short, the court of appeal properly ruled in accordance with long established California law concerning the rules of evidence and the requirements for admissibility under the business records exception to the hearsay rule, California Evidence Code § 1271. The ruling is in keeping with the decisions of other jurisdictions facing the same issues under similar evidentiary rules. As is explained more fully below, the

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2. *See, e.g., The Cadle Co. v. Phillips*, 120 N.M. 748, 906 P.2d 739 (N.M. App. 1995); *Sholdra v. Bluebonnet Savings Bank*, 858 S.W. 2d 533 (Ct. App. Tx. 1993).

ruling does not conflict with any of the cases cited by petitioner involving the *D'Oench Duhme* doctrine or the related federal statutes.[3]

Petitioner has cited no published federal court decisions which have reached contrary results. As to the unpublished decisions referenced in the petition, petitioner has failed to point to any which involve a note ledger for a revolving line of credit or other similar factual scenarios. Neither the law nor the facts warrant questioning of the appellate court's eminently correct decision.

II.

THE *D'OENCH DUHME* DOCTRINE AND 12 U.S.C. § 1823 DO NOT APPLY.

Remington's claim that there is a conflict between federal law as found in the *D'Oench Duhme* Doctrine and in 12 U.S.C. § 1823, and California law on evidence, is an issue that was already thoroughly analyzed and dealt with by the court of appeal. The appellate court correctly determined that there is no such conflict, and that Remington's interpretation of the federal authorities is erroneous and not intended by Congress. (App. 3a-6a). The trial court and court of appeal found, and petitioner cannot contend otherwise, that the *D'Oench Duhme* Doctrine and 12 U.S.C. § 1823 come into play when there are defenses of side agreements, misrepresentations, or omissions. No such defenses were involved in the trial court's decision in this case. In fact, the trial court's denial of summary of judgment to Remington was based on the fact it could not establish the amount of money owed by Hamedani. (App. 6a).

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3. Neither *D'Oench Duhme & Co., Inc. v. FDIC*, 315 U.S. 447 (1942) nor *Langley v. FDIC*, 484 U.S. 86 (1987) concern the issues raised in the case at bar.

Nor does petitioner's convoluted argument concerning the purported lack of fealty of a disgruntled bank officer create a proper ground for invoking the *D'Oench Duhme* doctrine and 12 U.S.C. § 1823(e)(1). Petitioner believes that a bank officer who has presumably lost his or her job at a failed bank would have reason to give false testimony concerning a proffered business record. (Pet. 7, 19). However, under petitioner's theory, a currently employed bank officer of a thriving bank would have equal incentive to lie in favor of his or her employer. Brought to its logical conclusion then, the standards for admission of a business record as set forth in Evidence Code § 1271 and similar state and federal statutes should be done away with completely because one could not trust any custodian of records to tell the truth.

III.

REMINGTON'S INTERPRETATION OF 12 U.S.C. § 1820(f) IS ERRONEOUS.

Nor, contrary to petitioner's brief, is admission of the Note Ledger mandated by 12 U.S.C. § 1820(f). Under petitioner's illogical reading of this statute, any copy of a document in a failed bank's files automatically becomes admissible to prove the purported content, after the bank's files are transferred to the FDIC. As the appellate court recognized, such an interpretation would have the absurd effect that copies of bank records would automatically be admissible without establishing foundation even when the originals are not. (App. 8a). Moreover, under petitioner's reading of the statute, the FDIC or its assignee would be guaranteed of receipt of the documents into evidence even though the same documents, presented by the failed bank at an earlier date when it was still in operation, would not have been admissible. Thus, petitioner's conclusion that the appellate decision contradicts this federal statute is unwarranted.

IV.

12 U.S.C. § 1821 DOES NOT AFFECT ADMISSIBILITY ISSUES.

In the petition to this Court, petitioner raises for the first time an argument based on 12 U.S.C. § 1821, that the FDIC became the custodian of the bank records and therefore any and all documents in the bank's files are automatically admissible. Under California law, and indeed under the Federal Rules of Evidence, a custodian of records declaration by itself is not sufficient to overcome a hearsay objection to business records.

In *Taggart v. Super Seer Corp.*, 33 Cal. App. 4th 1697, 40 Cal. Rptr. 2d 56 (1995), the court noted that the streamlined method for production of records of a business in response to a subpoena duces tecum set forth in Cal. Evidence Code § 1560 *et seq.* does not bring the records within the business records exception to the hearsay rule, embodied in section 1271.

As the *Taggart* court observed:

> It will readily be seen that a custodian's declaration may state all the matters it is required to state under section 1561, yet fail to provide a sufficient foundation for admission of the records under section 1271. (Citations omitted). Most significantly, the custodian's declaration is not required to state the "identity" or "mode of preparation" of the records. As a result, it will usually fail to show that "[t]he sources of information and method and time of preparation" of the records indicate their trustworthiness. "Therefore, in the face of a hearsay objection, the affidavit of the custodian, made

> pursuant to [section] 1561, does not satisfy the requirements of the business-records exception to the hearsay rule set forth in [section] 1271(c)-(d), and the copy of the business record, produced pursuant to [sections] 1560-1561, is inadmissible hearsay." ([1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 2d ed. 1982) Business Records] § 4.1, pp. 212-213).

33 Cal. App. 4th at 1706. The court went on to observe that the Legislature has expressly made admissibility under section 1562 conditional on satisfying the business records exception of section 1271:

> . . . We conclude that the Legislature did so intentionally, to prevent the wholesale admission of hearsay lacking any guarantees of reliability or trustworthiness. A contrary construction would create a hole in the business records exception big enough to drive a truckload of hearsay through; the proponent of a business record who could not show how it was prepared, or who knew that the way it was prepared would indicate that it was untrustworthy, could nevertheless introduce the record into evidence.

Id. at 1708.

Trustworthiness of records is the key to this case. Petitioner would have this Court believe that what troubled the trial court and court of appeal was the mere fact that Remington had failed to produce a body, *i.e.*, the custodian of records of the failed bank. But a review of the record and appellate opinion leaves no doubt that the result did not hinge simply on the fact that Sean Klingle didn't work for Independence Bank. What the

courts were looking for, and did not find, were "normal standards of reliability." (App. 6a). Indeed, under Fed. R. Evidence Rule 803(6) as well as California Evidence Code § 1271, the paramount requirement for admissibility of business records is trustworthiness. *See Miss. River Grain Elevator, Inc. v. Bartlett & Co. Grain,* 659 F.2d 1314 (5th Cir. 1981), cited in Petition at 17-18. Thus, there may be circumstances where business records come into evidence without testimony of the party who kept the records or supervised their preparation. The Note Ledger is not trustworthy just because Sean Klingle received it in a packet transferred from the failed bank to the FDIC and then to Remington.

V.

THERE IS NO CERTAINTY ON THE FACE OF THE "NOTE" AS TO THE AMOUNT OF FUNDS ADVANCED.

As the court of appeal correctly held, a conditional "promissory note" on a revolving line of credit is not equivalent to an unconditional promissory note in a fixed amount that is canceled upon repayment of the face amount, in regard to the presumption of Cal. Evidence Code Section 635. (App. 10a-11a). While there is a "near certainty" that the face amount of a promissory note in a fixed amount is advanced when the note is made (App. 11a), in this case, it is uncertain what amount was paid out to Hamedani. Thus, the trial court was correct in rejecting the Note Ledger since there was no evidence as to either the amount of money withdrawn by Hamedani or the amounts paid back.

CONCLUSION

This is not a case of a state court failing to accede to federal preemption. It is highly likely that, given the identical facts of this case, a federal court would have ruled the same way. There are threshold standards for admissibility of business records. Those standards are clearly set forth in the evidentiary rules of state and federal courts, and in the case law interpreting them. In enacting the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Congress did not decree that it was supplanting those evidentiary statutes.

For all of the reasons stated herein, Respondent respectfully requests that this Court deny Remington's Petition for Writ of Certiorari.

Respectfully submitted,

JUDITH B. GITTERMAN
Counsel of Record
JENKENS & GILCHRIST
SOLISH, ARBITER & GEHRING
Attorneys for Respondent
12100 Wilshire Boulevard
15th Floor
Los Angeles, California 90025
(310) 820-8800